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No. 06-1437

IN THE

Supreme Court of the United States

CLIENTS AND FORMER CLIENTS OF BARON & BUDD, P.C. and OCCUPATIONAL MEDICAL RESOURCES, INC.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The proceedings below were two "miscellaneous" matters opened in the United States District Court for the Southern District of Texas for document subpoenas issued at the instance of parties to litigation in the Asbestos Multi-District Litigation Court No. 875 ("MDL 875"), pending in the United States District Court for the Eastern District of Pennsylvania. The parties to those miscellaneous matters were: (1) the Texas entity to which the subpoenas[1] were directed, Occupational Medical Resources, Inc. ("OMR"), and (2) the parties who sought the subpoena. Respondents listed below, who are defendants in MDL 875 and are Respondents before this Court.

The 160 "individual" Petitioners listed as "clients and former clients of Baron & Budd, P.C." were not named in or served with any subpoena, and were, in fact, denied intervention by the Texas District Court in the miscellaneous proceedings. That order denying intervention by these individuals was not appealed, reversed, vacated, or disturbed, by the Court of Appeals' ruling on the petition for writ of mandamus. In fact, Petitioners did not raise it whatsoever in their petition to the Court of Appeals. Further, the District Court's denial of intervention is not raised as an issue in the Petition to this Court. Accordingly, as discussed in Section I below, the individual "clients and former clients of Baron & Budd, P.C." are not proper party-Petitioners with standing before this Court.

Respondents are A.R. Wilfley & Sons, Inc.; Accurate Felt & Gasket Co., Inc.; Allied Glove Corporation (sometimes sued as Nationwide Glove Corporation); Amsted Industries,

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[1] Technically identical subpoenas were served on OMR and for a related entity to ensure that all corporate entities associated with OMR were served. For the purposes of this brief, reference will be made to only a "subpoena" in the singular, issued to OMR itself.

Inc.; Baldor Electric Company; Bondex International, Inc.; CertainTeed Corporation; Chemtura Corporation; Cooper Alloy Corp.; Crossfield Products Corp.; Eastern Safety Equipment Company, Inc. (sometimes sued as Aearo Company); Flexo Products, Inc.; Gardner Denver, Inc.; General Electric Co.; Georgia-Pacific Corporation; The Gorman-Rupp Company; Gulf Coast Marine Supply Company; Pulsafeeder, Inc.; Viking Pump Company; Warren Rupp, Inc.; Illinois Tool Works Inc.; Ingersoll-Rand Company; Lawrence Pumps, Inc.; Magnetrol International Incorporated; Marine Specialty Company, Inc.; Mueller Steam Specialty; National Service Industries, Inc. f/d/b/a North Bros. Company; Owens-Illinois, Inc. d/b/a O-I; Pecora Corporation; Pneumo Abex, LLC; Rogers Corporation; Aurora Pump Company; BIF; DeZurik, Inc.; Layne & Bowler Pump Group; Marsh Instruments; Standard Equipment Company, Inc.; Turner Supply Company; Union Carbide Corporation; Amchem Products, Inc.; Warren Pumps, LLC; Yeoman's Chicago Corporation (also erroneously served for "Chicago Pump Company" and/or "Morris Machine Works/Morris Pumps"); Yuba Heat Transfer.

CORPORATE DISCLOSURES

The nongovernmental corporate party, A.R. Wilfley & Sons, Inc., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Accurate Felt & Gasket Manufacturing Co., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Allied Glove Corporation, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Amsted Industries, Inc., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Baldor Electric Company, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Bondex International, Inc., has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: RPM, Inc.

The nongovernmental corporate party, CertainTeed Corporation, has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: Saint Gobian.

The nongovernmental corporate party, Chemtura Corporation f/k/a Crompton Corporation, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Cooper Alloy Corporation, in the above listed civil action does not have any

parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Crossfield Products Corp., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Eastern Safety Equipment Company, Inc., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Flexo Products, Inc., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Gardner Denver, Inc., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, General Electric Company, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Georgia-Pacific LLC, f/k/a Georgia-Pacific Corporation, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, The Gorman-Rupp Company, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Gulf Coast Marine Supply Company, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Viking Pump, Inc., has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: IDEX Corporation.

The nongovernmental corporate party, Warren Rupp, Inc., has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: IDEX Corporation.

The nongovernmental corporate party, Illinois Tool Works Inc., successor by merger to Ransburg Corporation, successor by merger to the DeVilbiss Industrial Products Corporation, successor to the Industrial/Commercial Division of The DeVilbiss Company (on behalf of Illinois Tool Works, Inc.), does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Ingersoll-Rand Company, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Lawrence Pumps, Inc., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Magnetrol International Incorporated, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Marine Specialty Company, Inc., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Mueller Steam Specialty, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, National Service Industries, Inc., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Owens-Illinois, Inc. d/b/a O-I, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Pecora Corporation, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Pneumo Abex, LLC, has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: M & F Worldwide Corporation.

The nongovernmental corporate party, Rogers Corporation, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Aurora Pump Company, has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: Pentair, Inc.

The nongovernmental corporate party, BIF, has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: SPX Corporation.

The nongovernmental corporate party, DeZurik, Inc., has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: SPX Corporation.

The nongovernmental corporate party, Layne & Bowler Pump Group, has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: SPX Corporation.

The nongovernmental corporate party, Marsh Instruments, has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: Marsh Bellofram Corporation.

The nongovernmental corporate party, Standard Equipment Company, Inc., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Turner Supply Company, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Union Carbide Corporation, has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: The Dow Chemical Company.

The nongovernmental corporate party, Amchem Products, Inc., has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: The Dow Chemical Company.

The nongovernmental corporate party, Warren Pumps, LLC, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Yeoman's Chicago Corporation (also erroneously served for "Chicago Pump Company" and/or "Morris Machine Works/Morris Pumps"), does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Yuba Heat Transfer, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Fifth Circuit denying mandamus relief. That opinion is reported at 478 F.3d 670 (5th Cir. 2007).

STATEMENT OF THE CASE

On August 1, 2006, the Respondents, party defendants in MDL 875 pending in the United States District Court for the Eastern District of Pennsylvania, had document subpoenas issued to Petitioner OMR, a Texas company, through the

United States District Court for the Southern District of Texas. OMR operated as a "screening" enterprise for the purpose of identifying potential asbestos personal injury plaintiffs. The document subpoena sought the production of documents, for inspection and copying at its offices, related to those practices. The fraudulent, assembly-line practices of screening companies and unscrupulous physicians who have generated false "diagnoses" for mass tort claimants have been the subject of both judicial decisions and congressional inquiry. *See, e.g., In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 634-35 (S.D. Tex. 2005); *The Silicosis Story: Mass Tort Screening and the Public Health: Hearing Before the Subcomm. on Oversight and Investigations*, 109th Cong. (Mar. 8, 2006). The MDL 875 Court has specifically acknowledged that the practice of filing mass screened asbestos cases is "tantamount to a race to the courthouse," Admin. Order No. 8, at 1, *In re Asbestos Prods. Liab. Litig. (No. VI)*, MDL 875 (E.D. Pa. Jan. 15, 2002), and that court has specifically authorized discovery regarding litigation screenings, Admin. Order Authorizing Discovery Concerning Litigation Screenings, at 1, *In re Asbestos Prods. Liab. Litig. (No. VI)*, MDL 875 (E.D. Pa. Mar. 23, 1999).

The Rule 45 subpoena served on OMR only sought the production of specified documents and left the box on the subpoena form commanding a person to appear for deposition unchecked, as it was deemed by Respondents that no deposition of a company official would be necessary, at least at the time of production. The subpoena had a miscellaneous cause number assigned by the Southern District of Texas but indicated it related to case proceedings in MDL 875. In response to the subpoena, OMR filed objections on August 10, 2006 and a motion to quash in the Southern District of Texas on August 24, 2006. OMR's motion objected to the production of any documents whatsoever on the grounds, *inter alia*, that the request was unduly burdensome, overbroad, and sought production of "confidential commercial information." No ob-

jection, however, was lodged by OMR on the ground that the subpoena was for documents only and was not for a deposition. Similarly, on August 25, 2006, the individuals asserted to be "clients and former clients of Baron & Budd, P.C.," who were not named in or served with any subpoena, moved to intervene and to quash the subpoena, alleging privacy interests and that they were not plaintiffs in MDL 875, although some were admittedly asbestos plaintiffs in other cases. As with OMR, no objection was lodged on any claim that the subpoena to OMR was only for the production of documents.

On September 20, 2006, the Southern District of Texas issued an order denying the individuals' motion to intervene and, with respect to OMR, ruled that further pleadings on the subpoena dispute should be filed in MDL 875. App. at 5-6. The District Court did not address the merits of OMR's objections to the subpoena but, in effect, chose to defer ruling to the district judge for MDL 875, who has responsibility for coordinated and consolidated pretrial proceedings in asbestos cases.[1]

OMR, and also the would-be intervenors, then filed a petition for mandamus in the United States Court of Appeals for the Fifth Circuit, seeking extraordinary relief on the ground that the Texas District Court had wrongfully withheld jurisdiction to determine whether the subpoena should be enforced or quashed.

On February 7, 2007, a unanimous panel of the Fifth Circuit denied the petition for mandamus. App. 1-4. 478 F.3d 670 (5th Cir. 2007). The Court of Appeals, following the "overwhelming weight of authority" and "convincing analysis of myriad district courts," as well as the "persuasive analysis" of treatise commentators, held that in multi-district litigation

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[1] MDL 875 has already ruled on similar objections made by other entities who were served with identical subpoenas and overruled these objections.

matters, the court in charge of consolidated proceedings has the power to rule on a motion to quash subpoenas, issued by other district courts but related to MDL cases, and that subpoenas for the production of documents were included in that power.[2]

Petitions for panel rehearing and rehearing en banc were denied, with one dissent from the denial of panel rehearing. App. at 7.

It is noted that as no documents have been produced by OMR, Respondents filed a motion to compel production in October 2006 before the MDL Judge and the relative merits of the subpoena dispute remain pending before MDL 875 District Judge James Giles. In January 2007, Baron & Budd, P.C. filed a motion to intervene in the pending MDL proceedings with regard to the document subpoenas and to oppose their enforcement. That motion also remains pending.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition demonstrates none of the factors which would warrant the exercise of certiorari jurisdiction. As a threshold matter, the individuals described as "clients and former clients" of a law firm are not proper party-petitioners under the circumstances. Substantively, there is no conflict in the Circuit Courts of Appeal nor was there any departure from a decision of this Court in the Fifth Circuit's denial of mandamus relief. As the Court of Appeals observed, there is in fact a consensus among the district courts and treatise commentators that for subpoenas related to multi-district litigation, the

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[2] In denying mandamus relief on the merits of OMR's petition, the Court of Appeals declined to reverse or vacate the district court's order denying intervention to the individuals asserted to be "clients and former clients" of the law firm. Petitioners did not raise the denial of their motion to intervene whatsoever in their petition for writ of mandamus.

judge assigned to conduct consolidated and pretrial proceedings may logically and reasonably determine disputes related to document productions as well as depositions. The Fifth Circuit cannot be said to have erred in denying the extraordinary and discretionary remedy of mandamus under the circumstances and as a practical matter, the substantive validity of OMR's objections to the document subpoena are pending decision by the MDL judge.

I. THE INDIVIDUALS DESCRIBED AS "CLIENTS AND FORMER CLIENTS OF BARON AND BUDD, P.C." ARE NOT PROPER PARTIES TO THIS PETITION.

As a threshold matter, the 160 individuals described as "Clients and Former Clients of Baron and Budd, P.C." are not proper parties with standing to file the Petition under the particular circumstances here. The District Court in fact denied intervention to these individuals, and the Court of Appeals did not reverse, vacate or otherwise disturb that order, see above at the Statement of the Case. With the adverse ruling in the district court on their status as intervenors, the individuals are not the proper parties to seek review in this Court because the lower court's denial of their motion to intervene is not presented as an issue in the petition. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27 (1993). The instant petition does not include any issue seeking review of their status.

As explained by the Court in *Izumi*, the question of a would-be intervener's status is "akin to a question regarding a party's standing, which we have described as a threshold inquiry that in no way depends on the merits of the case." 510 U.S. at 427 (internal quotations and citations omitted). Although one who has been denied the right to intervene in lower courts may petition the Court for certiorari review, the question must be preserved by meeting Supreme Court Rule

14.1 (a), which provides that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." Under *Izumi*, a denial of intervention is a separate question that must be separately stated and is not "fairly included" in a petition devoted to questions on the merits. Here, the issues set forth in the Petition are whether the provisions of the multi-district litigation statute include document subpoenas and whether a motion to quash can be transferred by an issuing district court to another district court handling MDL proceedings. The existing denial of intervenor status for the individual "clients and former clients" of the law firm is neither mentioned nor fairly included in the issues set forth in the Petition.

Accordingly, only OMR, the "screening" business to which the subpoena was directed, may arguably be considered as a party-petitioner.

II. THERE IS NO CONFLICT IN THE CIRCUITS.

There is no conflict in the Circuit Courts of Appeal that would warrant this Court's exercise of certiorari jurisdiction, and the Petition cites none. In fact, the Fifth Circuit is the first and only court of appeals to address and rule upon the particularized issue of whether a district judge assigned to MDL proceedings may consider and rule upon a motion to quash a subpoena for documents sought in relation to the multi-district proceedings but issued by another district court. There is no conflict in this particular context, material or otherwise.

The Petition suggests at pp. 4-5 that the Fifth Circuit decision conflicts with *In Re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998). It does not. *Sealed Case* holds that for Rule 45 purposes, only an issuing district court for a subpoena may consider a motion to quash the subpoena, not the district court in which the underlying case is pending. *Sealed Case*, however, did not involve or consider a subpoena related to multi-

district proceedings assigned to a MDL judge under 28 U.S.C. § 1407 (b), and it is therefore distinguishable and not indicative of any real conflict with the Fifth Circuit.[3] Moreover, there is no real dispute among the district courts. In fact, as discussed in the section below, district courts and commentators that have addressed this issue are in agreement that a motion to quash a document subpoena related to multi district proceedings can be properly heard by a MDL court. *E.g.*, *In re Auto Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 485 n.5 (E.D. Pa. 2005); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F. Supp. 2d 270, 274-75 (D.D.C. 2002); *In re Subpoenas Served on Wilmer, Culter & Pickering & Goodwin Proctor LLP*, 255 F. Supp. 2d 1, 1-3 (D.D.C. 2003); *HCA, Inc. v. United States ex rel. Pogue*, 2002 WL 31953748, at *3-*4 (M.D. Tenn. 2002); *In re Subpoena Issued to Boies, Shiller & Flexner LLP*, 2003 WL 1831426, at *1 (S.D.N.Y. 2003); 9 James W. Moore et al., Moore's Federal Practice § 45.40[4], at 45-75 to 45-77 (Matthew Bender 3d ed. 2006) (footnotes omitted); 9A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2459, 2006 Supp., at 19 (West 1995).

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE MDL COURT MAY DECIDE DISPUTES RELATED TO DOCUMENT SUBPOENAS AS WELL AS SUBPOENAS FOR DEPOSITIONS.

There is no basis for the Court to grant the Petition, because the Court of Appeals correctly held, along with numerous district courts and leading treatise commentators, that a MDL judge under 28 U.S.C. § 1407(b) may determine

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[3] In fact, rather than conflicting with *Sealed Case*, the Fifth Circuit opinion accepted the basic premise that in normal litigation, "[a] motion to quash or modify a subpoena is to be granted by the court in which a subpoena was issued." App. at 3.

disputes related to document subpoenas issued in other district courts, as well as disputes relating to subpoenas for depositions issued in other district courts as part of its mandate to handle coordinated and consolidated pretrial proceedings. As one district court has put it, it would make "no sense" for § 1407 (b) to confer authority to conduct depositions but not the authority to require the production of documents. *United States ex rel Pogue v. Diabetes Treatment Ctrs. of Am. Inc.*, 238 F. Supp. 2d 270, 275 (D.D.C. 2002) (internal citation and quotation omitted).

The salutory purposes of the multi-district litigation statute, as well as the order creating asbestos MDL 875, include, *inter alia*, the centralized management and coordination of consolidated pretrial proceedings in transferred cases so as to permit the efficient, just and effective conduct of such actions. *See, e.g., In Re New York City Mun. Sec. Litig.*, 572 F.2d 49, 51 (2nd Cir. 1978).; *Pogue*, 238 F. Supp. 2d at 273; *In re Asbestos Prods. Liab. Litig. (No. VI), MDL No. 875*, 771 F. Supp. 415, 417 (holding that "centralization under § 1407 in the Eastern District of Pennsylvania will best serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation"). It is beyond question that the supervision and conduct of pretrial discovery, including the production of documents, depositions, and the motions pertaining thereto, are at the heart of the centralized nature of a MDL court and are the most basic judicial functions of the district judges assigned to those matters. MDL courts were created to avoid

> conflicting pretrial discovery demands for documents and witnesses [that] would disrupt the Federal courts. . . . The objective of the legislation is . . . to assure the 'just and efficient conduct' of such actions. The committee believes that the possibility for conflict and duplication in discovery and other pretrial procedures in related cases can be

> avoided or minimized by such centralized management. . . . By the term 'pretrial proceedings' the committee has reference to the practice and procedure which precede the trial of an action. These generally involve deposition and discovery . . . . [and] the [MDL] transferee district court would have authority to render summary judgement, to control and limit proceedings, and to impose sanctions for failure to make discovery or comply with pretrial orders.

H.R. Rep. 90-113, 90th Cong., 2nd Sess., 1968 U.S. Code Cong. & Adm. News 1898, *1-2 (Feb. 28, 1968).

Section 1407(b) states that MDL judges "may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions" in consolidated MDL cases. App. 21-22. Although the Fifth Circuit and district courts have acknowledged a potential tension between provisions of Rule 45 and the statutory permission granted a MDL judge to act "in any district" to "conduct depositions," the overwhelming consensus is that § 1407(a), reasonably construed, permits the MDL judge to act to resolve subpoena disputes in the issuing district, including disputes involving document subpoenas. The strained approach and prohibition advocated by Petitioners has been correctly rejected. *Pogue*, 238 F. Supp. 2d 270, 275 (holding that to effectuate the goals of § 1707 (b), "the power to act as the judge of any district for pretrial depositions includes as an incident power to enforce a subpoena duces tecum") (collecting cases); *In re Subpoenas Served on Wilmer, Cutler, Pickering and Goodwin Proctor LLP*, 255 F. Supp. 2d 1, 2 (D.D.C. 2003) (district court issuing document subpoena defers ruling on motion to quash to MDL judge because, *inter alia*, the subpoena "relates directly to a set of proceedings that have been consolidated for pretrial purposes." under § 1407 the MDL judge may exercise the powers of a district judge in *any* district, and

deferring to the MDL judge who was "already familiar with the massive litigation . . . serves the interests of justice, efficiency, and consistency that underlie the MDL rules"); *In re Subpoena Issued to Boies, Schiller & Flexner LLP*, 2003 WL 1831426 (S.D.N.Y. 2003) (deferring to MDL judge on motion to quash document subpoenas because enforcing or quashing a subpoena duces tecum is inherent to the authority to supervise pretrial proceedings and "pretrial depositions" in "any district."); *In re Auto Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 485 n.5 (E.D. Pa. 2005).

Accordingly, the lower federal courts have reached a reasonable and correct consensus in practice and approach to the resolution of this issue, and there is no pressing need for the intervention of this Court.

IV. THE "PLAIN MEANING" RULE OF STATUTORY CONSTRUCTION IS NOT IMPLICATED

The Petitionor contends at Pages 4-9 that the Court of Appeals departed from the "plain meaning" rule of statutory construction because the language of 28 U.S.C. § 1407(b) states that the MDL judge may exercise the powers of a district judge in any district for the purpose of "conducting pretrial depositions" in MDL proceedings. The Petition seeks to rely upon *Lexecon, Inc. v. Milberg, Weiss Bershad Hynes & Lerach*, 523 U.S 26 (1997). However, *Lexecon* is distinguishable and is not germane to the decision below, and the "plain meaning" rule, which Respondents concede is a principal method of statutory construction, cannot be stretched beyond its reasonable and intended uses. As noted above, the Petitioner's strained attempt to confine MDL judges to "conducting depositions" in other districts—and not permitting resolution of document disputes—has been fairly rejected by the lower courts.

First, the *Lexecon* decision is distinguishable in that it did not construe any provision of 28 U.S.C. § 1407(b), and it

applied the "plain meaning" rule to give literal effect to an explicit and unconditional statutory command that was in fact plain and straightforward. Section 1407(b) unambiguously required that:

> Each action so transferred [to a multi-district litigation court] *shall be remanded* [by the Judicial Panel on Multi-District Litigation] *at or before the conclusion* of such pretrial proceedings to the district from which it was transferred.

Id. (emphasis added). As found by *Lexecon*, the plain meaning of this straightforward command, which used the mandatory "shall," was that the "self transfer" of cases for trial, rather than a remand to the originating district for trial, was prohibited. 523 U.S. at 35-36. *Lexecon* did not address the very different language and purposes of § 1407(b), and accordingly the Fifth Circuit did not depart from that case in any way.

Second, the "plain meaning rule" almost by definition does not apply where statutory language is not obligatory and clear, nor does it compel a court in those circumstances to ignore the context of particular language, to discard the fundamental purposes of an act, or to reach an interpretation of language which is at odds with common sense. *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989) (re-jecting "hypertechnical" reading of statutory language as implausible and observing that it is fundamental that the words of a statute "cannot be construed in a vaccum" but, instead, "must be read in context and with a view to their place in the overall statutory scheme"); *U.S. Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-455 (1993) (noting that a statute's plain meaning must be enforced but that a court "must not be guided by a single sentence or member of a sentence but look to the provision of the whole law, and to its object and policy") (internal quotation omitted). The Petition's claim that disputes over document subpoenas

related to MDL pretrial proceedings are never within the purview of a MDL Judge makes just these mistakes.

The lower courts which have rejected such arguments have understood that a strained and narrow reading of the type of subpoena disputes that may be considered by a MDL Judge would be at odds with the overriding purposes of multi-district litigation and would be illogical. The isolated words, taken at the most literal extreme argued for in the petition would limit the MDL judge only to "conducting pretrial depositions" in other districts—an unusual concept and terminology—and not even to determine disputes arising over depositions. The provision at issue is not in the nature of an express mandatory limitation on the MDL judge; it does not use the unambiguous "shall." And, from a practical standpoint, it would make no sense for a MDL judge to be able to determine disputes regarding deposition subpoenas and not also be able to require the production of subpoenaed documents related to those depositions or any other MDL proceeding. *See, e.g.*, *Pogue*, 238 F. Supp. at 275. The *Pogue* court further explains the counterproductive nature of requireing that a MDL party only seeking the production of documents, as permitted by Federal Rule of Civil Procedure 45(c)(2)(A), to also have to demand a deposition.

> [A subpoena duces tecum can be issued as an incident to] a deposition. In this case, however, the subpoena duces tecum was not issued pursuant to a deposition notice. . . . Relator understandably did not want to waste his allotted depositions by noticing depositions to accompany these subpoenas duces tecum for the sole purpose of invoking the Court's jurisdiction to enforce under § 1407. The laws and rules governing federal courts strive to minimize elaborate formality and needless procedure. . . . To effectuate those goals and to avoid placing on parties and nonparties from whom

> documents are sought the burden of holding a pro forma deposition in order to come under the aegis of § 1407, see Fed. R. Civ. P. 45(c)(2)(A) (a subpoena to produce documents does not require the person to appear), the Court holds that the power to act as the judge of any district for pretrial depositions includes as an incident the power to enforce subpoenas duces tecum.

238 F. Supp. 2d at 274-75.

The Petitioner's "plain meaning" argument is without merit as a basis for review of the Court of Appeals' judgment.

V. THE EXTRAORDINARY REMEDY OF MANDAMUS WAS NOT WARRANTED IN THE COURT OF APPEALS

Finally, it is respectfully submitted that the context in which this Petition arises, from the denial by the Court of Appeals of the extraordinary remedy of mandamus, also militates against the exercise of the Court's certiorari jurisdiction.

The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Allied Chem. Corp. v. Daiflon, Inc.*, 499 U.S. 33, 34 (1980). In the Court of Appeals, the burden was on Petitioner to "show that its right to issuance of a writ is clear and indisputable." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 662 (1978) (granting certiorari but overturning a grant of mandamus). Only exceptional circumstances "amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." *Will*, 437 U.S. at 95. The use of the writ in aid of appellate jurisdiction "has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n.*, 319 U.S. 21, 26 (1943).

The Southern District of Texas deferred ruling on the motion to quash to the MDL judge. Under the circumstances, there was neither a usurpation of judicial power nor a clear, explicit obligation commanding the Texas Court not to defer to the MDL judge. Accordingly, the Court of Appeals did not err in denying the discretionary and extraordinary remedy of mandamus. Similarly, mandamus relief usually requires a demonstration that the petitioner lacks an available alternative remedy. *Allied Chem. Corp. v. Daiflon, Inc.*, 499 U.S. 33, 33 (1980). Here, OMR is not without any alternative remedy, as the substantive merits of the validity of the OMR objections to the Respondents' document subpoena is pending for decision by the MDL 875 Judge.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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